TD 7/ 85

Decision rendered September 20, 1985

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT And in the Matter of a Hearing Before a Human Rights Tribunal Appointed Under Section 39 of the Canadian Human Rights Act

BETWEEN:

MARK FORSEILLE Complainant

and

UNITED GRAIN GROWERS LTD. Respondent

HEARD BEFORE: L. David Wilkins

Appearances: RENE DUVAL Counsel for the Commission
DAVID MARTIN Counsel for the Respondent assisted by DAVID HOBBS

Introduction

The hearing before this Tribunal results from a claim brought by Mark Forseille alleging that he was discriminated against by his employer, United Grain Growers Ltd. on the basis of a physical handicap contrary to Sections 7 and 10 of the Canadian Human Rights Act.

The complaint form introduced to the proceedings as Exhibit C- 4, dated November 3rd, 1980, sets out the complaint as follows:

"I believe that the United Grain Growers Ltd. discriminated against me when I was refused continued employment as a grain handler because I have a physical handicap: I am a diabetic. This was the reason given for my dismissal."

The pertinent provisions of the Canadian Human Rights Act as they existed at the time of the complaint are as follows:

Section 7(a) "It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual... on a prohibited ground of discrimination." Section 10

"It is discriminatory practice for an employer or an employee organization (a) to establish or pursue a policy or practice, or

(b) enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

In Section 3 of the Canadian Human Rights Act as it was at the institution of this hearing, one of the prohibited grounds of discrimination was cited as "physical handicap".

Physical Handicap was defined in Section 20 of the Act as follows: "physical handicap" means a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical co- ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a seeing eye dog or on a wheelchair or other remedial appliance for device.

It was not disputed that the illness of diabetes mellitus, present in the complainant, was a physical disability or infirmity, caused by illness falling within the definition of "physical handicap" contained in the Act.

FACTS

At all relevant times to this hearing, Mark Forseille was a young man of eighteen (18) years approximately, who had since the age of eleven (11) been afflicted with diabetes mellitus. His illness was categorized by all witnesses as insulin dependent type 1 diabetes.

Mark Forseille was called on September 10th, 1980, by Henry Krancs of the Grain Workers Union in Local 33 in response to a prior application by him for membership in the Union. On attendance upon Mr. Krancs and completion of the Union requirements, including an application form, he was advised to report to the offices of the Respondent, the United Grain Growers Ltd. and did so on the same day.

Upon his attendance at the premises of the Respondent, Mr. Forseille was instructed to attend upon the Medical Clinic engaged by the Respondent for a physical examination. He then attended upon the L. A. Patterson and Associates Clinic where he was seen by Dr. Rondeau who conducted a physical examination of Mr. Forseille. During the course of his examination the Complainant disclosed to Dr. Rondeau that he was a diabetic and referred Dr. Rondeau to his family doctor, Dr. Angus. Mr. Forseille gave evidence that in his presence Dr. Rondeau contacted Dr. Angus by telephone to discuss his state of health.

Dr. Rondeau then provided Mr. Forseille with a blue card, entered as Exhibit R- 3 indicating on his examination he found Mark Forseille to be physically fit".

The Complainant then returned to the Respondent's elevator and was informed by the foreman that he was to start work on the following day, September 11th, 1980. The Complainant returned to work on September 11th, 1980 and was engaged in the performance of duties assigned to him until September 19th.

During his shift of work on September 19th, Mr. Forseille was advised by the foreman that he was again to report to Dr. Rondeau. On his attendance at the office of Dr. Rondeau on September 19th, Mr. Forseille was advised that his employment was being terminated, which was effective immediately.

The Complainant then received a letter dated September 25th, 1980 and an Unemployment Insurance Commission Severance Statement bearing the same date by mail, which documents were entered as Exhibit C- 2 and C- 3 respectively at the Hearing.

At the time of his dismissal the Complainant was being paid $10.50 per hour for a forty (40) hour week. The Complainant advised that notwithstanding considerable effort by himself, he was unable to secure further full time employment until March 22nd, 1981. He presented evidence that this had been his first regular job and that he received no unemployment benefits upon termination of the job, although he had earned approximately $500.00 working for his Uncle's janitorial firm as holiday relief.

Dr. Rondeau was a resident of Montreal at the time of the hearing and was not called to give evidence. Statements concerning discussions between Dr. Rondeau and both the Complainant and Mr. Owen, the Manager of the Respondent were offered in evidence. Dr. Rondeau submitted a report to the Respondent, entered as Exhibit R- 4 in these proceedings, which although bearing the date of September 10th, 1980, was not submitted to the Respondent until after the termination of the Complainant's employment. In that Exhibit it was noted that Dr. Rondeau medically classified the Complainant as an individual with a "medical problem of significance. This may include a permanent or temporary disability that may or may not progress. Only a special applicant in this category should be employed."

Evidence was given by Mr. Owen, the General Manager of the Respondent Company, that job applicants were processed in accordance with the provisions of the Collective Agreement with the Union, which Collective Agreement was entered as Exhibit R- 2 to this proceedings. The Respondent itself had no application form to be completed by prospective employees. The Respondent had no policy relating to employment of diabetics and there were no guidelines relating to the health of applicants for employment apart from the requirement by the Respondent for pre- employment medical examination. Evidence was led that the Respondent had in fact at least one diabetic in its employ in an office capacity.

Mr. Owen gave evidence that on approximately September 16th or 17th, he received advice that Dr. Rondeau had called to speak to him specifically with respect to Mark Forseille. The evidence concerning the participation of Dr. Rondeau in that and a subsequent conversation with Mr. Owen was objected to by Counsel for for the Commission as being hearsay. Counsel for the Commission subsequently agreed with the admissibility of that evidence relative to the question of the subjective test facing the employer in attempting to establish a bona fide occupation requirement, but not for the medical opinions that might have therein been expressed by Dr. Rondeau.

Evidence was given by the Complainant in his examination in chief that Dr. Rondeau had advised him in the termination interview that the Company did not want to continue his

employment as he was a a low risk due to his diabetes. On cross examination the Complainant admitted that Dr. Rondeau explained that the Company was concerned about the possibility of fainting or becoming dizzy and that Dr. Rondeau had suggested that the Company was concerned that he might have a reaction "right on the spot". The Complainant admitted that on speaking with the Respondent's foreman, Mr. Jeffrey, he was advised that the discharge was because of a possibility that he might faint or become dizzy, although Mr. Jeffrey advised him that he was a good worker.

In his conversation with Dr. Rondeau, Mr. Owen indicated that Dr. Rondeau specifically wished to make him aware that Mark Forseille was a juvenile diabetic and that his case was severe but he felt that Forseille was employable but "there were restrictions and that there were some risks involved". He described that the risks were dizziness and fainting and that the restrictions were that Forseille should not be in charge of heavy vehicles or manipulating machinery.

Mr. Owen then gave evidence that he had a conversation with the Union Business Agent, Mr. Krancs advising him of the conversation with Dr. Rondeau and outlining the concerns of Owen with respect to safety in the circumstances. Mr. Krancs reportedly agreed that Forseille should not be employed in his job as grain handler for safety reasons and Dr. Rondeau was to report that situation back to Mr. Forseille.

Mr. Owen further gave evidence that although the Patterson Clinic were the regular Company Medical Advisors, he was completely unfamiliar with Dr. Rondeau until this incident. It was in his conclusion that Dr. Rondeau was unfamiliar with the nature of the job or the job site at the Respondent's plant. Mr. Owen gave evidence that he had no particular knowledge of diabetes in a technical sense and that his decision to dismiss Mr. Forseille was based on his concern for the possibility of fainting and dizziness and its potential resultant effect on the safety of the plant.

The nature of the employment of Mr. Forseille and, indeed the job site, were the subject of considerable evidence, including the taking of a view by the Tribunal, and the reports and evidence given by W. F. Thomas, an expert in safety consultation, who gave evidence on behalf of the Respondent and Mr. L. G. Larson, a safety expert, who gave evidence on behalf of the Complainant.

The tasks required of the person holding the job of the Complainant at the Respondent's plant were outlined on Exhibit R- 8 introduced to these proceedings and discussed in some detail by the Complainant, Mr. Owen, the two safety experts, and the expert medical witnesses.

In the area known as the track shed, these duties included physical operations necessary to move hopper and box cars in and out of the track shed, the opening of box car doors or grain shutes of hopper cars, spotting rail cars, cleaning up grain spills. In addition, a grain handler might be called upon to clear debris off the roof of the building and to clean screening equipment as well as to assist in the cleaning out of grain or other matter in silos. There were other duties usually of a temporary nature requiring the attendance of grain handler in the conveyor belt area and in the gallery with respect to the loading of grain into the ships holds.

Having had the opportunity of taking a view and hearing the evidence given, there can be no doubt whatsoever that there is a significant risk to the safety of the individual employee, his co-workers, and the plant itself arising out of any lack of attentiveness or physical agility by an individual employee however the same may have been caused. The job involves dealing with heavy equipment in a confined area and performing tasks that would necessarily involve alertness and physical agility and some strength.

Extensive expert medical evidence was given by Dr. Clayton Reynolds on behalf of the Respondent and by Dr. K. G. Dawson on behalf of the Complainant as to the nature of the Complainant's illness, its treatment and the effect that illness might or would have on the Complainant's ability to perform tasks as a grain handler for the Respondent. Dr. Reynolds concluded that the medical evidence was such that in his opinion Forseille should not be employed in that capacity while Dr. Dawson came to the opposite conclusion.

There was no disagreement however that at the time of this employment, the Complainant was an insulin dependent diabetic and had been since the age of eleven years up to the time of his employment under the treatment of Dr. Angus. At the time of his employment he was attempting to control his illness by one insulin injection per day of approximately 120 - 125 units of N. P. H. insulin taken before breakfast. He further exercised diet control based on food exchanges with a knowledge of calorie intake on the basis of three meals per day with three snacks between meals. The Complainant carried sugar tablets regularly which he understood were to be used to ward off early systems of hypoglycemic reaction. He described the use of these tablets as a response to a lack of energy which could usually be predicted on a basis of activity which required extra effort or a delay of a snack or a meal. He indicated that the use of tablets for these reasons was taken occasionally and they were carried by the Complainant virtually at all times. He gave evidence that he had sugar tablets with him during the term of his employment with the respondent but did not take any during that period. He gave evidence that he did not experience any dizziness associated with hypoglycemic reactions. The sole test undertaken by the complainant as a measurement of his diabetes control was a urine test, which he administered himself once a day for the most part and for which he kept written records. He attended upon his Doctor, Dr. Angus approximately every three months for an assessment of his progress. He reported an occasional hypoglycemic reaction could be expected when his schedule changed or some other unusual event arose.

The expert testimony of both Dr. Reynolds and Dr. Dawson was to the effect that the program described by Mr. Forseille was not a optimum diabetes management program, even on the basis of medical standards in the fall of 1980. Dr. Dawson took over the care of the Complainant shortly thereafter and changed his management program significantly by prescribing a split dosage daily involving two different types of insulin at each injection. The Complainant then took a morning injection of 54 units of N. P. H. and 10 units of Toronto Insulin with an additional injection prior to dinner (the evening meal) of 50 units of N. P. H. and 8 units of Toronto Insulin. His measurement system was changed to the use of a glucometer which measured the blood sugar level as opposed to the urine test which measured only the presence of discharged sugar in the urine.

MEDICAL EVIDENCE

Dr. Clayton Reynolds was called as an expert medical witness by the Respondent and was accepted as an expert medical witness by the Tribunal. His qualifications and achievements in the field of endocrinology, internal medicine and the treatment of diabetes were submitted as Exhibit R- 6 to these proceedings. At the time of the hearing Dr. Reynolds was engaged in the clinical practice of endocrinology with a large emphasis on the management of diabetes. He described for the Tribunal the basic aspects of the disease known as diabetes mellitus; categorizations within that condition; some common symptoms and the causes of those symptoms; and the effect of insulin upon a diabetic patient. Dr. Reynolds described in detail his review of the medical evidence associated with the condition of diabetes in the complainant which included a review of correspondence by Dr. Keith Dawson, his attending physician, and his hearing of the evidence presented by the complainant at this hearing.

Based upon that information he concluded that the Respondent was, in his opinion, a type one, insulin dependent diabetic within the clinical definition of an unstable diabetic. His categorization of the complainant as "clinically unstable" was based upon the complainant's history of episodes of hypoglycemia alternating with periods of high blood sugar.

These conclusions were based on the reported condition of the complainant prior to 1982 when the complainant's treatment program was changed under the care of Dr. Dawson.

Dr. Reynolds advised that the categorization of the complainants condition as unstable reflected failure of his former treatment program to manage his diabetes properly.

An extensive discussion was presented on the specific and general effects of hypoglycemic reactions. Evidence was adduced as to two types of reactions being adrenergic and neuroglycopenic reactions. Dr. Reynolds explained that in the former, the patient experienced a type of fright reaction such as fast heart beat, sometimes with palpitations, sweating, anxiety, trembling of the hands, and often weakness. In the latter reaction, the patient becomes confused, displaying incoherent thought.

From his review of the medical information available to him and recited by the complainant, Dr. Reynolds concluded that at the time of his employment with the respondent, Mr. Forseille was an unstable, type one, insulin dependent diabetic who was undergoing a less than optimum treatment program for his disease.

Dr. Reynolds was present at the time of the view was taken by this Tribunal of the worksite and gave evidence of an earlier attendance at the site in 1982.

Dr. Reynolds expressed the opinion based on the state of treatment of Mr. Forseille's illness, the nature of the work place and his duties therein, that the complainant should not have been permitted to continue his employment due to concerns about safety of the complainant and others in the work site.

Dr. Keith Dawson was called as an expert medical witness by the Commission and accepted as such by the Tribunal. His credentials included certification as a specialist in the field of endocrinology, full professorship of medicine at the University of British Columbia, a director of

the diabetes specialty centre for the Province of British Columbia. Dr. Dawson also presented evidence as to the general nature of the disease known as diabetes millitus, its manifestations and categorizations.

He gave evidence as to his treatment of the complainant commencing in 1982 which followed the discharge from the employment of the respondent. He described changes he instituted in the measurement and program of the complainant's illness. He gave evidence that as a result of the program changes the hemoglobin AIC of the patient had dropped to the low diabetic range and his blood sugar level was within satisfactory range although still not optimal.

Dr. Dawson gave evidence of having viewed the work place and considered the evidence as to the nature of the duties required to be performed by the complainant in his employ with the respondent. Dr. Dawson came to the conclusion that the complainant should have been allowed to continue in that employment.

Considerable evidence was adduced by both witnesses as to the significance of a severe reaction experienced by the complainant at age 11 in which he had been rendered unconscious. The conclusion of Dr. Reynolds was that as similar type of reaction might be possible in this patient, while Dr. Dawson was of the contrary opinion due to the particular circumstances involved in that incident.

In my opinion the existence of points of dispute in the testimony of the two expert medical witnesses are not critical to determination of this case.

Although the two medical experts come to different opinions as to their assessment of the continued employabilty of the complainant, they did agree that an assessment of the risk posed by the continued employment of the complainant had to be made by the employer. They both agreed that the treatment program of the complainants illness was less than optimal even on the basis of general treatment practices in 1980. They both agreed that advances in the knowledge and understanding by the medical profession in relation to diabetes and its treatment from 1980 to the present had been considerable.

SAFETY EXPERT EVIDENCE

Evidence was introduced by both the commission and the respondent and by witnesses who were accepted as experts in the field of industrial safety by the Tribunal.

Mr. W. F. J. Thomas was called on behalf of the respondent and L. G. Larson by the commission. Both witnesses described to the Tribunal their examination of the work place, the functions to be performed by a grain handler, and the risk involved in those operations to the individual and others within the work place.

Both witnesses presented an opinion as to the suitability of the continued employment of the complainant by the respondent based on their information and assessment of the effects of the complainant experiencing a hypoglycemic reaction while performing his duties.

Mr. Thomas concluded that the duties required by the complainant required a high level of alertness and that even a minor impairment of the complainants alertness due to a mild hypoglycemic reaction would create a safety hazard. Mr. Larson, on the other hand, did not consider the potential impairment of the complainants abilities under hypoglycemic reaction to create an appreciable safety hazard.

THE ARGUMENT

The Counsel for the Commission argued that by virtue of the dismissal from employment of the Complainant by reason of his diabetes, the Respondent had discriminated against the Complainant on a prohibited grounds and the Complainant was therefore entitled to damages which should be paid at a rate equal to the pay he was receiving from the period of September 19th to his return to employment March 22nd 1981, together with additional damages for the injury to the Complainant's feelings arising out of his dismissal.

The Respondent argued on the following basis:

1. That the Respondent had not discriminated against the Complainant on the basis of a prohibited grounds, being his physical handicap by way of diabetes.

2. Alternatively, if such discrimination had occurred, it was not prohibited under the Act in that it was not done with any intention to discriminate.

3. In the alternative, that in the event that there was discrimination in the meaning of the Canadian Human Rights Act, there was a bona fide occupational requirement for such discrimination based on safety considerations.

4. The Respondent accepted the allegation of damages made by the Complainant as being reasonable subject to offsetting the income made by the Complainant during the period September 19th to March 22 and further excepting claim for damage based on injury to feelings.

CONCLUSIONS

1. It is the conclusion of the Tribunal that there is no basis for the complaint made hereunder pursuant to the provisions of Section 10 of the Canadian Human Rights Act. The evidence is undisputed that the Respondent has no policy or practice with respect to the employment of diabetics and in fact there is at least one diabetic in the employ of the Respondent. The Respondent has no application form submitted to prospective employees and issues no health guidelines affecting employees other than its requirement for a pre- employment medical examination. There was no evidence adduced that the Collective Agreement entered into between the Respondent and the Union contained any provisions which might deprive or tend to deprive any individual of employment opportunities on a prohibited ground of discrimination, in particular a physical handicap.

2. With respect to the allegation of discriminatory practice arising out of the refusal to continue the employment of Mark Forseille on the prohibited ground of discrimination based on his

physical handicap, it is this Tribunal's conclusion that the condition of the diabetes mellitus present in the Complainant was a physical handicap within the meaning of the Canadian Human Rights Act.

Furthermore it is my conclusion from the evidence, that the basis for terminating the Complainant was his physical handicap due to diabetes mellitus and therefore a prima facia case of discrimination on a prohibited ground has been made out by the Complainant.

3. Having found the existence of a discriminatory practice, the onus shifts to the Respondent to establish that the act of discrimination falls within the exception created by the act known as "a bona fide occupational requirement" (BFOR). The standard of proof facing the Respondent under that onus is the balance of probabilities. (Ontario Human Rights Commission v Borough of Etobicoke (1982) 132 D. L. R. (3rd) 14 at P. 19

In considering elements required to establish BFOR the Supreme Court of Canada in a judgment issued by Mr. Justice McIntyre for the Court stated at Page 19- 20 of that judgment:

"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory requirement at a fixed age, must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objections which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to ensure the efficient and economical performance of the job without endangering the employee, his fellow employees, and the general public."

It was alleged by counsel for the commission that the respondent had dismissed the complainant simply because he was a diabetic and, that this case was a good example of a blanket policy or irrational or prejudicial attitude on the part of an employer which the Canadian Human Rights Acts was enacted to control. He alleged the company had failed to assess the complainant's condition on an individual basis. He argued that an individual assessment by the company would have disclosed a low risk in the continued employment of Mr. Forseille which the company should have accepted.

On the facts as presented to this Tribunal those arguments simply cannot be sustained. There is no evidence that the respondent was predisposed against the employment of diabetics generally. The only evidence presented indicated no physical restrictions on employment with the Respondent other than an examination by the respondent's medical advisors. No guidelines as to physical requirements were provided to those medical advisors for qualification of employment applicants. Indeed, there was evidence of the company employing another diabetic at the pertinent time.

Furthermore the evidence disclosed that the complainant was engaged to work initially by the respondent, notwithstanding his disclosure of his condition diabetic to Dr. Rondeau. The evidence is clear that the reason for dismissal of the complainant was not a company prejudice

but the communication by Dr. Rondeau to Mr. Thomas after commencement of the employment of Dr. Rondeau's qualification concerning the complainant's fitness for work.

The evidence is clear that Dr. Rondeau initiated the contact with management and in a conversation with Mr. Thomas provided the opinion that the employment of Mr. Forseille was subject to restrictions and involved risks. In the opinion expressed by Dr. Rondeau to Mr. Thomas, Mr. Forseille should not have been in charge of heavy vehicles or manipulated machinery and, furthermore his continued employment would involve an assessment of the risk arising from his illness which Dr. Rondeau reported to Mr. Thomas as involving "dizziness and fainting".

Counsel for the commission argued further the the Complainant was not individually assessed by the respondent through its medical advisor, Dr. Rondeau. Again the evidence presented to this Tribunal is contrary to that argument.

It is clear from the evidence that the complainant himself, that Dr. Rondeau made a specific inquiry as to the nature of Mr. Forseille's particular illness directly to his own attending physician.

It is further clear that Dr. Rondeau did not have a predetermined negative attitude toward diabetics as he had approved Mr. Forseille as "physically fit" notwithstanding having information that he was a diabetic.

The evidence before the Tribunal indicated that the opinion of Dr. Rondeau concerning the employability of the complainant was based on his individual assessment of the complainant's illness. On the basis of that assessment Dr. Rondeau recommended employment of the complainant should be restricted so as to avoid handling heavy machinery and also required the respondent to accept a risk of "dizziness and fainting". The respondent on receiving that medical opinion, reached the conclusion that a grain handler's duties permitted no such restrictions and that the respondent could not accept the risk out of concerns for plant safety.

On the basis of the evidence adduced at the hearings I am of the opinion that the limitation imposed on the employment of the Complainant was imposed honestly, in good faith and in the sincerely held belief that it was imposed in the interest of the adequate performance of the work involved as a grain handler in the plant of the Respondent, with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons. As such the Respondent has met the subjective portion of establishing that the discrimination against the Complainant falls within the BFOR exception.

It was alleged by the Respondent, in the alternative, that satisfaction of this aspect of the test was sufficient to determine the issue before this Tribunal. In reference to the decision of the Federal Court of Appeal in Canadian National Railway v. K. S. Bhinder 1983 CHRR Page 1404, Counsel for the Respondent argued that an intention to discriminate on a prohibited ground was an essential element to a finding of discrimination by this Tribunal. He argued that as no evidence of such intention was before the Tribunal the onus upon the Respondent was fully satisfied.

While the judgment in the Bhinder case seems to support this argument, particularly on the basis of the dissenting views of Heald J. at Page 1404, Paragraph 12093, it should be noted that even in his dissenting remarks Heald J. was of the view that the act did not extend to discrimination "in which there is neither a discriminatory intention or motivation or differential treatment". In the judgment of Ledain J. at Page 1412, Paragraph 12141 the Court stated:

"The issue, as I see it, is not so much whether a discriminatory intention or motivation is required for the discriminatory practices defined by sections 7 and 10 of the Canadian Human Rights Act, as whether they include indirect as well as direct discrimination. Quite clearly the Act is concerned with discriminatory effects, and in a case of differential treatment, such as unequal pay, it is the objective fact of discrimination rather than intention of matters. The distinction is between differential treatment, which may or may not be accompanied by a discriminatory motivation or animus, but which will generally be intended, and what is on its face equal treatment but nevertheless has a discriminatory effect on a particular person by reason of a prohibited ground or basis of discrimination."

I am drawn to the conclusion that all members of that Court agreed that in a case of differential treatment, the absence of an intention to discriminate was not the sole determinant.

As differential treatment has occurred in the case at hand, it is my opinion that proof of lack of intention is not sufficient to satisfy the onus upon the Respondent who must also satisfy the objective aspects of the BFOR exception.

Extensive evidence was adduced by the Respondent to demonstrate that the dismissal of the Complainant was made by the Respondent in the interest of the safety aspect of adequate performance of the work in the operations of the Respondent and was reasonably necessary to assure efficient performance of the job without endangering the Complainant, his fellow employees, and the general public.

Mr. Owen for the Respondent indicated repeatedly that the paramount concern of the Respondent was the question of safety. Having been afforded the opportunity to take a view of the work site and having heard the testimony of the experts in the field of occupational safety produced by each of the Complainant and the Respondent, I am of the opinion that the employment of the Complainant as a grain handler carried with it very real risks to his personal safety, the safety of his co- workers, and to some lesser extent, the safety of the public.

The evidence is clear that the Respondent relied on the opinion of its medical examiner, Dr. Rondeau, who recommended to Mr. Owen that the Complainant’s employment be restricted so as to avoid handling heavy machinery and would furthermore involve a possibility of "dizziness and fainting". The Respondent concluded that employment by the Complainant as a grain handler by its nature precluded work within the restriction imposed and the risk of "dizziness and fainting" was not acceptable for reasons of safety.

It was argued by Counsel for the Complainant that the conclusion of the Respondent was not reasonable. The Complainant adduced evidence through his medical expert, Dr. Dawson, who expressed his opinion that the risk of dizziness and fainting was very slight at best, and in his

opinion the Complainant could have adequately performed the job tasks facing him. The safety expert called for the defence also concluded that the Complainant could have performed the tasks assigned to a grain handler without significant risk to safety.

On the other hand the expert medical witness called by the Respondent, Dr. Reynolds, came to the opposite conclusion and testified that he would recommend against the employment of the Complainant in the task of grain handler. Similarly the safety expert called by the Respondent also recommended against employment of the Complainant.

Having heard all of the evidence it is my opinion that the actions of the Respondent taken out of concern for safety were reasonable and therefore satisfy the objective aspects of proving that the discrimination against the Complainant falls within the BFOR exception. In my view the Respondent was entitled to rely on the opinion of Dr. Rondeau as to the limitations facing the employment of the Complainant and acted reasonably in concluding that in face of those limitations, the Respondent should terminate that employment.

4. In the event it may be determined that I am wrong in the conclusion which I have reached on this matter, counsel for both parties have requested that I deal with the issue of damages. Counsel were essentially agreed that the measure of compensation to which the complainant would have been entitled had he been successful in his argument before this Tribunal, would have been calculated on payment by the respondent to the complainant of a salary of a rate of $10.50 per hour for a 40 hour week from the date of his dismissal September 20, 1980 until his return to other employment March 21, 1981 less an amount of $500.00 representing income earned during that period.

It is most unfortunate in my opinion that the communication of the medical opinion of Dr. Rondeau to Mr. Owen did not occur immediately following his examination of the Complainant, or even prior to his having provided to Mr. Forseille a card pronouncing him "physically fit".

The Tribunal can sympathize with the disappointment of the Complainant which was no doubt felt on being terminated after a successful start at his job and after having been told his job performance was satisfactory. The evidence is undisputed, that Mr. Forseille was looking forward to this employment as his first long term employment period. Accordingly I would have awarded under the heading of special compensation damages in the amount of Five Hundred Dollars ($ 500.00) had I reached a different conclusion concerning the liability of the Respondent.

For the foregoing reasons the complaint herein is dismissed.

DATED at the City of Medicine Hat, in the Province of Alberta, this 28th day of August , A. D. 1985.

L. David Wilkins - Tribunal